APPENDIX A

SUPREME COURT OF ALABAMA

OCTOBER TERM, 1993-94

1920604

Gilford Partners, a limited partnership

v.

Richard Pizitz, et al.

Appeal from Jefferson Circuit Court
(CV-91-7641)

INGRAM, JUSTICE.

The plaintiffs — Richard Pizitz, Merritt Pizitz, Jill Pizitz, Richard Pizitz, Jr., and Susan Pizitz Bosshard — sued the defendants — Gilford Partners, H. Robert Holmes, Holmes-Gilford General Partners, and Gilbrooke Associates, Inc. — alleging various violations of the Alabama Securities Act, §§ 8-6-1 through - 33, Ala. Code 1975, arising out of the sale of an unregistered security to the plaintiffs' partnership, Pizitz Family Investment Partnership IX (hereinafter the "Pizitz Partnership").[1] The plaintiffs alleged (1) that the defendants had failed to register the limited partnership interest in Gilford Partners, in violation of § 8-6-4; (2) that Holmes and Holmes-Gilford had failed to register as agent and dealer, respectively, in violation of § 8-6-3; and (3) that the defendants had made misrepresentations and omissions in information sent to the plaintiffs, in violation of § 8-6-17. The plaintiffs also

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[1]The Pizitz Partnership was created for the sole purpose of purchasing and retaining investments on behalf of the individual family member investors.

alleged causes of actions for violation of 15 U.S.C. § 77*l*(2), for common-law fraud, and for breach of fiduciary duty. The defendants moved to dismiss for lack of personal jurisdiction; the plaintiffs responded and moved for a partial summary judgment for statutory damages, under § 8-6-19(a)(1), on the plaintiffs' claim of failure to register the security, in violation of § 8-6-4, and failure to register as an agent and a dealer, in violation of § 8-6-3(a). The trial court denied the motion to dismiss and granted the partial summary judgment as to Gilford Partners only.[2] The partial summary judgment was made pursuant to Rule 54(b), Ala. R. Civ. P.

Gilford Partners appeals, raising two issues: (1) whether the trial court erred in denying the motion to dismiss for lack of personal jurisdiction; and (2) whether the defendants presented substantial evidence that the Pizitz Partnership was an "institutional buyer" under § 8-6-11(8), evidence to defeat the plaintiffs' motion for summary judgment.

Personal Jurisdiction

Gilford argues that the circuit court erred in failing to dismiss for lack of personal jurisdiction. In its order denying Gilford's motion to dismiss, the trial court stated:

> "[The Pizitz Partnership cites] a number of bases for the Court's assertion of personal jurisdiction over Gilford. Because the Court has determined that the sale of the Gilford limited partnership interest without registration was unlawful, only one of these grounds need be considered. As the court concluded in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), nonresident defendants who unlawfully sell unregistered securities in the forum state subject themselves to personal jurisdiction in the state in actions to enforce statutory remedies for such unlawful sales. As is clear from

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[2]The parties agreed for the trial court to reserve ruling on the plaintiffs' motion for a partial summary judgment with respect to the remaining defendants.

> Ala. Code §§ 8-6-2(8) and 8-6-12, Gilford's unlawful 'offer to sell' and acceptance of [the Pizitz Partnership's] 'offer to buy' the security occurred in Alabama."

We affirm the denial of Gilford's motion to dismiss for lack of personal jurisdiction. Rule 4.2, Ala. R. Civ. P., states, "A person has sufficient contacts with the state when that person, acting directly or by agent, is or may be legally responsible as a consequence of that person's . . . (C) Causing tortious injury or damage by an act or omission in this state. . . ." Section 8-6-12, Ala. Code 1975, provides that the Securities Act of Alabama, §§ 8-6-1 through -33, applies to "persons who sell or offer to sell when (1) an offer to sell is made in this state, or (2) an offer to buy is made and accepted in this state." The section further provides that "[a]n offer to sell or to buy is made in this state . . . when the offer (1) originates from this state, or (2) is directed by the offeror to this state and received at the place to which it is directed (or at any post office in this state in the case of a mailed offer)." § 8-6-12(c). The statute provides that the offer to buy or sell is *accepted* "when acceptance (1) is communicated to the offeror in this state, and (2) has not previously been communicated to the offeror, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state . . . when the offeree directs it to the offeror in this state. . . . . " § 8-6-12(d).

The court in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), found that the defendants in that case, who had failed to register the security sold to the plaintiff, "[had] subjected themselves to the jurisdiction of [the Illinois] court. Because the injury . . . took place in Illinois, that state was the situs of the tortious act." 419 F. Supp. at 18. The court further stated that exercising jurisdiction did not offend the "traditional notions of fair play and substantial justice," because the defendants should have foreseen the possibility of being sued in the Illinois forum. *Id.*, at 18-19. The district court held that an action such as that against the defendants was foreseeable because "[the] defendants [had]

sold an interest in a limited partnership to a specifically identified purchaser residing in Illinois." The court added that "[i]t [was] certainly fair under the circumstances to require them to litigate a controversy concerning that sale in Illinois." *Id.*, at 19.

In the present case, Gilford concedes that, under §§ 8-6-11 and 8-6-12, the sale of the security is deemed to have occurred in Alabama. It argues, however, that the statutes create a "legal fiction" that is insufficient to allow the trial court to assert personal jurisdiction over it. We disagree. As stated in *Florendo*, the sale of an unregistered security causes a "tortious injury," and the sale under §§ 8-6-11 and 8-6-12, occurred in Alabama. Therefore, we hold that Gilford had sufficient contacts with this State because it may be legally responsible for "causing tortious injury or damage by [its] act or omission in this state." *See* Ala. R. Civ. P. 4.2(C).

Summary Judgment

"It is unlawful for any person to offer or sell any security in this state unless: (1) It is registered under this article; (2) The security is exempt from registration under section 8-6-10; or (3) The transaction is exempt under § 8-6-11." § 8-6-4, Ala. Code 1975; *see also* § 8-6-11(a) (expressly stating that §§ 8-6-3 through 8-6-9 do not apply to the listed exempt transactions). Gilford argues that the trial court erred in entering the summary judgment in favor of the Pizitz Partnership because, Gilford argues, it had presented substantial evidence that Pizitz Partnership was an "institutional buyer" and, therefore, that the transaction was exempt from the registration requirements under § 8-6-11(8).

The trial court held that, given the beneficent purpose of the blue sky laws,[3] the exemption was to be narrowly construed. *See* 69 Am. Jur. 2d *Securities Regulation-State* § 6 (1973)

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[3]The term "blue sky laws" originated with an early description of the purpose of state security laws as protecting investors against "speculative schemes which have no more basis than so many feet of blue sky." *Hall v. Geiger-Jones Co.*, 242 U.S. 539 (1917).

("the general view is . . . that blue sky laws, being enacted for the protection of the public, should be liberally construed to effectuate that purpose"). Section 8-6-11(8) states that a transaction is exempt from §§ 8-6-3 through 8-6-9 of the Alabama Securities Act if it contains

> "[a]ny offer or sale to a bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act or 1940, pension or profit-sharing trust or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity. . . . "

In its order, the trial court interpreted § 8-6-11(8) as follows:

> "The maxim *ejusdem generis* dictates that, '"when general words follow an enumeration of words of a particular and specific meaning, such general words are held to apply only to persons or things of the same kind, as those designated by the particular words . . . "' *Ex parte Capital City Asphalt, Inc.*, 437 So. 2d 1291, 1293-94 (Ala. 1983) (citation omitted). The statutory phrase 'other financial institution or institutional buyer' is immediately preceded by 'bank, savings institution, credit union, trust company, insurance company, or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust.' The term 'institutional buyer' must, therefore, be limited to the same kind of institutional investors as those specifically enumerated and cannot be expanded to include wholly different classes of investors such as the Pizitz Partnership.
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> ". . . None of the specific institutions enumerated in the statute or comment includes private investors or groups of private investors buying securities for their own accounts. Moreover, none of these specified categories of institutions is qualified, for purpose of application of the exemption, by size, wealth, or sophistication requirements. Therefore, the inclusion of such buyers within the definition of

'institutional buyer' based on wealth and sophistication would violate the doctrine of *ejusdem generis*.

". . . .

"Although the conclusion that investment partnerships such as the Pizitz Partnership are not 'institutional buyers' is compelled both by principles of statutory construction and the mandate that exemptions to the Alabama Securities Act be narrowly construed, the Court is not satisfied that there is any logic to requiring registration of securities sold to partnerships composed of wealthy, sophisticated individuals whose assets and investment experience might exceed that of many small savings institutions or colleges. This incongruity does not dictate a different result, however, since the same argument could be made with respect to wealthy, sophisticated individuals, who would not be exempt, under even the broadest conceivable definition of 'institutional buyer.'"

We agree with the trial court and hold that, as a matter of law, the § 8-6-11(8) exemption for sales to "institutional buyers" does not apply to Gilford's sale to the Pizitz Partnership. There being no genuine issue of material fact, we affirm the summary judgment in favor of the Pizitz Partnership. Rule 56, Ala. R. Civ. P.

AFFIRMED.

Hornsby, C.J., and Almon, Shores, and Steagall, JJ., concur.

APPENDIX B

IN THE CIRCUIT COURT OF
JEFFERSON COUNTY, ALABAMA

RICHARD PIZITZ, RICHARD PIZITZ, JR. MERRITT L. PIZITZ, JILL PIZITZ; and SUSAN PIZITZ BOSSHARD	)	
Plaintiffs,	)	Civil Action No. CV 91-7641
v.	)	
GILFORD PARTNERS, a limited partnership; HOLMES-GILBROOKE GENERAL PARTNERS, a general partnership; H. ROBERT HOLMES; and GILBROOKE ASSOCIATES, INC.,	)	
Defendants.	)	

ORDER

This cause arises upon the following motions:

(a) The motion to dismiss for lack of personal jurisdiction filed by defendants Gilford Partners ("Gilford"), Holmes-Gilbrooke General Partners ("Holmes-Gilbrooke"), H. Robert Holmes ("Holmes"), and Gilbrooke Associates, Inc. ("Gilbrooke"); and

(b) the motion for summary judgment filed by plaintiffs Richard Pizitz, Richard Pizitz, Jr., Merritt L. Pizitz, Jill Pizitz, and Susan Pizitz Bosshard, by which they seek statutory damages pursuant to Ala. Code § 8-6-19 (1984)[1] for (1) defendants' failure to register the limited partnership interest in

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[1] Ala. Code § 8-6-19 provides a private right of action, and sets forth the measure of damages, for violations of §§ 8-6-3 and 8-6-4. That section provides in pertinent part:

Gilford that was sold to plaintiffs, as required by Ala. Code § 8-6-4 (1984), and (2) Holmes' and Holmes-Gilbrooke's failure to register as an agent and dealer, respectively, as required by Ala. Code § 8-6-3 (1984).[2]

Upon consideration of the motions, and of the accompanying affidavits, briefs, and oral argument presented by counsel, the Court concludes that summary judgment is due to be entered in favor of the plaintiffs and against Gilford for Gilford's failure to register the limited partnership interest pursuant to Ala. Code § 8-6-4 (1984). By agreement of the parties, the Court reserves ruling on the motions with respect to the remaining defendants.

Plaintiffs are partners in Pizitz Family Investment Partnership IX, an Alabama general partnership (the "Pizitz Partnership"). Richard Pizitz and Merritt L. Pizitz are brothers, and Richard Pizitz, Jr., Jill Pizitz, and Susan Pizitz Bosshard are children of Richard Pizitz.

The Pizitz Partnership was formed in 1987 for the purpose of investing funds with a money management firm unrelated to any of the defendants. In 1988, the partners became dissatisfied with the money manager's performance and instructed the firm to liquidate its position. The funds were distributed

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(a) Any person who:

(1) Sell or offers to sell a security in violation of any provision of this article . . .

* * *

is liable to the person buying the security from him who may bring an action to recover the consideration paid for the security, together with interest at six percent per year from the date of payment, court costs and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. Damages are the amount that would be recoverable upon a tender less the value of the security when the buyer disposed of it and interest at six percent per year from the date of disposition.

[2] The parties have settled the conversion claim set forth in Count Seven of the Amendment to Complaint, as to which plaintiffs also sought summary judgment.

to the individual partners, and the Pizitz Partnership became inactive.

In 1990, the Pizitz Partnership was revived for the purpose of purchasing a limited partnership interest in Gilford. The partnership agreement was amended, and new capital was contributed by the partners for the purpose of this investment. The Gilford limited partnership interest was acquired in May 1990 for a purchase price of $545,880 and liquidated for the sum of $179,320 as of March 31, 1991.

The Gilford limited partnership interest purchased by the Pizitz Partnership constitutes a "security" within the meaning of Ala. Code § 8-6-2. Ala. Code § 8-6-4 makes it unlawful for any person to offer or sell any security in Alabama unless it is registered under the Act or unless the security or sale is exempt from registration. The Gilford limited partnership interest was not, either at the time of its sale to the Pizitz Partnership or at any other time, registered under the Alabama Securities Act.

A. Defendants' Motion to Dismiss

Plaintiffs cite a number of bases for the Court's assertion of personal jurisdiction over Gilford. Because the Court has determined that the sale of the Gilford limited partnership interest without registration was unlawful, only one of these grounds need be considered. As the court concluded in *Florendo v. Pan Hemisphere Transport, Inc.*, 419 F. Supp. 16 (N.D. Ill. 1976), nonresident defendants who unlawfully sell unregistered securities in the forum state subject themselves to personal jurisdiction in the state in actions to enforce statutory remedies for such unlawful sales. As is clear from Ala. Code §§ 8-6-2(8) and 8-6-12, Gilford's unlawful "offer to sell" and acceptance of plaintiffs' "offer to buy" the security occurred in Alabama.

B. Plaintiffs' Motion for Summary Judgment

Aside from personal jurisdiction, the only defense asserted to plaintiffs' motion for summary judgment is the transac-

tional exemption set forth in Ala. Code § 8-6-11(a)(8) (1984) for "institutional buyers."[3] Gilford contends that a family partnership formed for the purpose of investing in securities can be an "institutional buyer" if it or its members have sufficient wealth, investment experience, and sophistication not to require the protection of the securities laws. Plaintiffs assert that a partnership of individual investors formed for the purpose of trading in securities for their own account cannot, as a matter of law, be an "institutional buyer," regardless of the wealth, investment experience, or sophistication of the individuals or the partnership.

In granting plaintiffs' motion for a protective order to defer discovery concerning plaintiffs' wealth, investment experience, and sophistication, the Court indicated that, for purposes of the motion for summary judgment, it would assume whatever facts Gilford asked it to assume. Consequently, the Court makes no findings with respect to the extent of the plaintiffs' wealth, investment experience, or sophistication. It is undisputed, however, that the Pizitz Partnership and each of its partners is an "accredited investor" within the meaning of the Section 501 of Regulation D of the Rules and Regulations of the United States Securities and Exchange Commission, 17 C.F.R. § 230.501.[4]

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[3] Ala. Code § 8-6-11(a)(8) provides in part:

> (a) Except as hereafter in this section expressly provided, sections 8-6-3 through 8-6-9 shall not apply to any of the following transactions:
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> * * *
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> (8) Any offer or sale to a bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust or other financial institution or institutional buyer, or to a dealer, whether the purchaser is acting for itself or in some fiduciary capacity.

[4] This section provides in pertinent part:

> (a) *Accredited investor.* "Accredited investor" shall mean any person who comes within any of the following categories, or who the issuer reasonably believes comes within any of the following

The term "institutional buyer" is not defined by statute or regulation, and no Alabama court decisions or administrative rulings have defined the term. The Alabama exemption was modeled after section 402(b)(8) of the 1956 Uniform Securities Act, but the uniform act similarly fails to define "institutional investor."[5] Moreover, there is no case law defining or interpreting the terms "institutional investor" or "institutional buyer" within the meaning of parallel exemptions in other states. In view of the complete absence not only of controlling Alabama authority, but of precedent from other jurisdictions,[6] the meaning of "institutional buyer" must be deter-

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> categories, at the time of the sale of the securities to that person:
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> (5) Any natural person whose individual net worth, or joint net worth with that person's spouse, at the time of his purchase exceeds $1,000,000;
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> (6) Any natural person who had an individual income in excess of $200,000 in each of the two most recent years or joint income with that person's spouse in excess or $300,000 in each of those years and has a reasonable expectation of reaching the same income level in the current year;
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> * * *
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> (8) Any entity in which all of the equity owners are accredited investors. Although the record is not conclusive as to whether each member of the partnership in fact had sufficient assets or income to qualify as an "accredited investor," Gilford "reasonably believe[d]" that they did, based upon questionnaire responses to that effect provided by Richard Pizitz, the managing partner of the Pizitz Partnership.

[5] The official comment to this section of the 1956 Uniform Securities Act states only the following:

> The term "institutional buyer" is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale. The term may be either left to *ad hoc* interpretation or defined by an interpretative rule. . . .

[6] Gilford's reliance on *Stein v. Twilight Motel, Inc. of Fla.*, 29 Ill. App. 2d 131, 172 N.E.2d 642 (1961), *Brannon v. Rinzler*, Nos. 12219, 12310 (Ohio Ct. App. Oct. 18, 1991) (1991 WL 216403), and *J.J. Enters. v. Hawk Energy Co.*, No. 12589 (Ohio Ct. App. Jan. 28, 1987) (1987 WL 6066), is misplaced. *Stein* was decided on the basis of an Illinois statutory exemption for "any associa-

mined by reference to the purpose of the securities laws and to other applicable rules of statutory construction.

It is well established that blue sky laws should be liberally construed to effectuate their purpose of protecting the public from deceit perpetrated in the sale of securities. *Midwest Management Corp. v. Stephens, supra*, 291 N.W.2d at 901. Conversely, exemptions from registration under such laws are to be narrowly construed. As the Alabama Securities Commission has held:

> The general pattern of the Alabama Securities Act - a sweeping prohibition, subject to a limited number of carefully designed exemptions, considered together with the nature and particularity of the exemptions themselves emphasizes rather than obscures the basic purpose of the Act to protect investors and stresses the generality of its intended application. In this setting, it is clear that the *exemptions must be strictly construed* and that the claimant of an exemption has the burden of showing that he falls within the terms of the exemption he claims. Indeed, Section 48 of Title 53, Code of Alabama 1940, as amended [Section 8-6-30, Code of Alabama, 1975], precludes any other construction.

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tion engaged as a substantial part of its business or operations in purchasing or holding securities." No such exemption has ever been included in the Alabama Securities Act. Moreover, at the time *Stein* was decided, the Illinois statute did not even contain the term "institutional investor" or "institutional buyer." Similarly, although the Ohio statute at issue in *Brannon* and *J.J. Enterprises* provided an exemption from registration for sales to "institutional investors," this term was expressly defined by the statute to include "any association engaged, as a substantial part of its business or operations in purchasing or holding securities." Thus, the issue in *Brannon, J.J. Enterprises*, and *Stein* was simply whether the respective plaintiffs' general partnerships were "associations" within the meaning of the Ohio and Illinois statutes. The Court also is unpersuaded by the ruling of the Kentucky director of the Division of Securities that a family investment partnership can be an institutional investor within the meaning of the Kentucky securities statute. [1971-1978 Transfer Binder] Blue Sky Rep. (CCH ¶ 27,555 (Mar. 7, 1975). The Kentucky securities directors' decision was based upon *Stein* and similar authority which the Court has rejected as inapposite.

> "In any proceeding under this chapter, the burden of proving an exemption or an exception from a definition is upon the person claiming it."

[1971-1978 Transfer Binder] Blue Sky L. Rep. ¶ 7552 (Ala. Sec. Comm'n Aug. 9, 1976) (emphasis supplied) (attached as Exhibit C hereto); *accord Rogers v. Cowley*, [1982-83 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,178, [1982-1984 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 71,831, No. C81-2305A (N.D. Ga. Mar. 14, 1983) (1983 WL 1306).

Although the rationale for exempting sales to certain entities from registration requirements has been stated to be those entities' presumed sophistication, *see Farmers & Merchants Bank v. Hamilton Hotel Partners*, 702 F. Supp. 1417, 1422 (W.D. Ark. 1988), it cannot be said that investment sophistication is, conversely, sufficient to bring a buyer within the exemption. As stated in *Martin v. Orvis Bros. & Co.*, 323 N.E.2d 73 (Ill. App. Ct. 1974):

> In *Reid v. NX Corporation*, 11 Ill. App. 3d 706, 708, 297 N.E.2d 380, this court stated that the purpose of exempting sales from registration when the purchaser is himself a dealer, is that it is assumed dealers, like the other institutional investors enumerated in Section 4, subd. C, are capable of protecting themselves and do not require the protection afforded by the Act. However, *unless the specific words of the exemption provisions require their inclusion, private investors are not denied coverage under the Act merely because they are "sophisticated investors."*

Id. at 81 (emphasis supplied); *accord Midwest Management Corp. v. Stephens*, 291 N.W.2d 896, 905 (Iowa 1980). Even more recently, in *Harrison v. Fulkerson*, 548 N.E.2d 15 (Ill. App. Ct. 1989), the Illinois appellate court held:

> We must note that the decisions of Illinois courts that have interpreted the Act and its exemptions have spoken of "sophisticated investor" exemptions. [Citing *Stein*].

> . . . Use of the word "sophisticated" is a paraphrase of the statute; a paraphrase can lead to the wrong result. *The test is not "sophistication;" rather, the test is the express language contained in the exemption. Investors are not deprived the protection of the Act merely because the are "sophisticated."* [Citing *Martin v. Orvis Bros.*]. *Investors fall outside the protection of the Act only if the Act specifically excludes them.* [Citing *Martin v. Orvis Bros.*].

Id. at 16 (emphasis supplied).

The maxim *ejusdem generis* dictates that, "'When general words follow an enumeration of words of a particular and specific meaning, such general words are held to apply only to persons or things of the same kind, as those designated by the particular words . . . . '" *Ex parte Capital City Asphalt, Inc.*, 437 So. 2d 1291, 1293-94 (Ala. 1983) (citation omitted). The statutory phrase "other financial institution or institutional buyer" is immediately preceded by "bank, savings institution, credit union, trust company, insurance company or investment company as defined in the Investment Company Act of 1940, pension or profit-sharing trust." The term "institutional buyer" must, therefore, be limited to the same kind of institutional investors as those specifically enumerated and cannot be expanded to include wholly different classes of investors such as the Pizitz Partnership.

The additional categories suggested by the official comment to the 1956 Uniform Securities Act are of the same type as those specified in the statute:

> The term "institutional buyer" is broad enough to cover, for example, a college purchasing for its endowment fund or perhaps a labor union investing its surplus funds on a substantial scale.

None of the specific institutions enumerated in the statute or comment includes private investors or groups of private investors buying securities for their own accounts. Moreover, none of these specified categories of institutions is qualified, for purpose of application of the exemption, by size, wealth, or sophistication requirements. Therefore, the inclusion of

such buyers within the definition of "institutional buyer" based on wealth and sophistication would violate the doctrine of *ejusdem generis*.

In addition to principles of statutory construction, the Court has considered the practical implications of a holding that some investment partnerships might be included within the exemption. The exemption unquestioningly cannot have been intended to apply to all partnerships formed for the purpose of investment, since such an interpretation would include even $10 per week investment clubs. Consequently, if the Court were to hold that purchases of securities by investment partnerships can be exempt under the Alabama Securities Act, some standards would have to be adopted so that ordinary, unsophisticated investors would retain the protections of the Act. Simply instructing a jury that it must determine whether a particular plaintiff is an "institutional investor" would require that the jury interpret the statute, which is not its function. In addition, because one jury might conclude that a $1,000,000 net worth is required, but another might be satisfied with $100,000, submission of the issue to a jury would eliminate any certainly [sic. certainty] in application of the exemption.[7] Moreover, if the Court were to adopt wealth and sophistication standards, such as a minimum net worth or a minimum number or volume of previous trades, it would be undertaking a function properly left to the legislature.

The Court has considered the adopting the federal "accredited investor" standard[8] as a benchmark for application of the "institutional buyer" exemption to investment partner-

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[7] Although the official comment to the 1956 Uniform Securities Act states that "institutional buyer" may be left to "*ad hoc* interpretation," the submission of such an issue to a jury certainly cannot have been intended, any more than the submission to a jury of the question whether colleges in general or any particular college is an "institutional buyer." "*Ad hoc* interpretation" suggests only that, rather than attempting an all inclusive list or definition, the court may simply determine whether the particular type of investor at issue in the case before it is or is not included.

[8] See note 4, *supra*.

ships. This standard is mentioned in the comments to the 1985 Uniform Securities Act and has the advantage not only of ease of application, but of representing the considered judgment of someone other than this Court as to an appropriate bright line test.[9] The Court is persuaded, however, that the Alabama legislature could not have intended the adoption of this standard, since (a) the Alabama exemption statute was not based on the 1985 Uniform Act; (b) the comment to the 1985 Uniform Act does not suggest that "accredited investor" and "institutional investor" are, or should be, synonymous; (c) the recognition in the comment of the "accredited investor" concept, coupled with the drafters' decision to use a different term plainly suggests that some other meaning of "institutional investor" was intended; and (d) the definition of "accredited investor" is a changing standard defined by a regulation the United States Securities and Exchange Commission, as amended from time to time. The Securities and Exchange Commission does not consider the terms to be synonymous; indeed, it designates only those accredited investors listed in Rule 501(a)(1) of Regulation D, not Rule 501(a)(8), as "institutional investors." *See* Release No. 33-6683. 52 Fed. Reg. 3015.01 (proposed January 30, 1987). Moreover, the only authority located on the application of the accredited investor standard to blue sky exemptions is an opinion of the general counsel for the Kansas Securities Commission, which states:

> [Q]ualifications as an accredited investor under Section 2(15) of the Securities Act of 1933 and a net worth in excess of several million dollars would not necessarily qualify that person as an institutional investor under a blue sky exemption such as K.S.A. 17-1262(f).

1991 WL 276173 (Kan. Sec. Comm'n Dec. 5, 1991).

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[9] The comment states:

> The federal securities laws utilize the concept of "accredited investors" which include a variety of corporate and individual investors satisfying financial and other criteria.

Although the conclusion that investment partnerships such as the Pizitz Partnership are not "institutional buyers" is compelled both by principles of statutory construction and the mandate that exemptions to the Alabama Securities Act be narrowly construed, the Court is not satisfied that there is any logic to requiring registration of securities sold to partnerships composed of wealthy, sophisticated individuals whose assets and investment experience might exceed that of many small savings institutions or colleges. This incongruity does not dictate a different result, however, since the same argument could be made with respect to wealthy, sophisticated individuals, who would not be exempt under even the broadest conceivable definition of "institutional buyer." Even more importantly, the Court must recognize that

> The purpose of interpretation is not to improve a statute but rather to explain the express language used in the statute.

Montgomery Bridge & Eng'g, Inc. v. State, 440 So. 2d 1114, 1115, (Ala. Civ. App. 1983).

Because plaintiffs have demonstrated that there is no other genuine issue as to any material fact, they are entitled to summary judgment as a matter of law on their claims against Gilford for damages under Ala. Code § 8-6-19 (1984). The Court further expressly finds that there is no just reason for delay in the entry of final judgment in plaintiffs' favor, pursuant to Ala. R. Civ. P. 54(b). The Court has been advised (a) that upon expiration of the time for appeal or upon affirmance of this order, plaintiffs will dismiss their claims for fraud and breach of fiduciary duty; and (b) that upon payment of this judgment, interest, costs and any attorneys' fees this Court might award, plaintiffs will dismiss their claims against the remaining defendants. Consequently, certification of this order as final may result in a more expeditious resolution of this case.

Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. That a final judgment be, and it hereby is, entered in favor of the plaintiffs an against Gilford in the amount of $428,677.20, including interest through October 31, 1992, together with $723.12 , representing interest for the period from November 1, 1992 through the date of this judgment at the rate of $60.26 per day.

2. That the judgment set forth in paragraph 1 above is a final order under the provisions of Ala. R. Civ. P. 54(b).

3. That plaintiffs are given leave to file an application for attorneys' fees within 30 days after the later of: (a) the expiration of the time for filing a notice of appeal from this order, (b) the dismissal of any appeal from this order, or (c) the issuance of a mandate of the Alabama Supreme Court affirming this order.

4. Costs taxed to defendant.

This the 12 day of November , 1992.

ARTHUR J. HANES
Circuit Judge